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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN, *Appellants.*

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska, *Appellees.*

On Appeal From the Supreme Court of the State of Alaska

JURISDICTIONAL STATEMENT

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On Appeal From the Supreme Court of the State of Alaska

JURISDICTIONAL STATEMENT

JURISDICTIONAL STATEMENT

This is an appeal from the judgment and opinion of the Supreme Court of the State of Alaska, as announced on June 3, 1977, and formally entered on June

13, 1977, upholding the constitutional validity of a state law giving Alaska residents employment preference in substantially all oil and gas related employment in Alaska. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented meriting plenary consideration.

OPINION BELOW

The opinion of the Supreme Court of the State of Alaska, not yet reported, appears in Appendix I.

JURISDICTION

The mandate of the Supreme Court of the State of Alaska was entered on June 13, 1977. Notice of appeal and this jurisdictional statement were filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 USC 1257(2).

QUESTION PRESENTED

May the State of Alaska require private employers involved in any oil and gas activities resulting from leases with the State to first hire and last fire Alaska residents in preference to the residents of the other states?

STATUTORY PROVISIONS INVOLVED

Chapter 40, Title 38, Alaska Statutes entitled "Local Hire Under State Leases" (Alaska Hire) is set forth in Appendix II.

The 1976 Alaska Legislature amended paragraph 1 of AS 38.40.090(3) to read:

> (a) Except for brief intervals, military service, attendance at an educational or training institution, or for absence for good cause, is physically present in the State for a period of one year immediately before the time his status is determined.

Administrative Regulations have been adopted by the Alaska Department of Labor to implement Alaska Hire. They are set forth in Appendix III.

STATEMENT OF THE CASE

The Supreme Court of Alaska divided 3 to 2 on the privileges and immunities question here presented. The forty-one page opinion and dissent of that Court, Appendix A, sets forth the factual record below, the statutory scheme of Alaska Hire involved, and the privileges and immunities question presented under the Constitution of the United States. Appellants' position is cogently set forth in the dissent by Chief Justice Boochever with whom former Chief Justice Rabinowitz joined.

The majority described the case:

> This case considers the constitutionality of the 'Alaska Hire' law, AS 38.40. 'Alaska Hire', enacted in 1972 and amended in 1976, requires that all oil and gas leases, easements or right-of-way permits for oil or gas pipelines, unitization agreements or any renegotiation of any of these to which the state is a party, contain a requirement that qualified Alaska residents be hired in preference to non-residents.

Op. p. 2. With regard to the breadth of Alaska Hire, footnote 1 observes that:

> The number of jobs covered by the law varies with the number and size of petroleum and pipe-

line projects in progress. In June 1976, the commissioner of labor testified that it applied to about 12,000 jobs, approximately 6 percent of the total employment in the state.

Alaska Hire applies to the oil pipeline now in the final stages of construction. It will apply to any natural gas pipeline. Should any oil and gas leases ever be renegotiated, it will apply to them. It will apply to offshore oil and gas development under state leases. The present North Slope oil and gas leases are not covered since they were entered into prior to July 7, 1972, the effective date of AS 38.40. See AS 38.40.050(a).[1]

But the dissenting Justices noted the direct impact of Alaska Hire is broader yet:

---

[1] The transportation system for Alaska natural gas must be approved by President Carter not later than September 1, 1977. At least a significant portion will be constructed in Alaska. *See* Alaska Natural Gas Transportation Act of 1976, 15 USC 719.

The national interest in Alaska natural gas is described in the Act:

§ 719. Congressional findings.

The Congress finds and declares that—

(1) a natural gas supply shortage exists in the contiguous States of the United States;

(2) large reserves of natural gas in the State of Alaska could help significantly to alleviate this supply shortage;

(3) the expeditious construction of a viable natural gas transportation system for delivery of Alaska natural gas to United States markets is in the national interest; and

(4) the determinations whether to authorize a transportation system for delivery of Alaska natural gas to the contiguous States and, if so, which system to select, involve questions of the utmost importance respecting national energy policy, international relations, national security, and economic and environmental impact, and therefore should appropriately be addressed by the Congress and the President in addition to those Federal officers and agencies assigned functions under law pertaining to the selection, construction, and initial operation of such a system.

> Only if qualified Alaska residents are unavailable, may others be employed. *The provisions of the act apply also to all employment which is the result of oil and gas leases,* easements, leases or right-of-way permits for oil or gas pipeline purposes and unitization agreements. Thus, the act appears to include employment opportunities at refineries and in distribution systems utilizing oil and gas obtained under Alaska leases. (emphasis supplied).

Op. p. 32.

Alaska Hire in fact applies even to the work of "suppliers" on non-state owned lands. *See* Appendix III. 8 AAC 35.080.

The case below presented the Alaska Supreme Court with two major issues:

> that the one year durational residency requirement (of Alaska Hire) violates the State and Federal equal protection clauses, and that any residency requirement violates the privileges and immunities clause of Article IV of the United States Constitution.

Op. p. 4.

The Alaska Supreme Court unanimously concluded that the one year durational residency requirement to qualify as an Alaska resident under Alaska Hire did in fact violate the State and Federal equal protection clauses, and accordingly held that a durational residency requirement of more than thirty (30) days was not constitutionally permissible. *Op.* p. 31. The majority did find, however, that a bias in favor of actual Alaska residents in oil and gas employment was constitutionally acceptable:

> We believe that the better alternative is to consider Alaska Hire an economic measure justified by the

> 'natural resources exception', the principal that a state may prefer its residents in dealing with natural resources it owns.

Op. p. 26.

Appellants are asking this Court to reverse this second holding. Appellants rely heavily upon the dissent of Justices Boochever and Rabinowitz, which realizes that "the local hire statute runs afoul of the concept of federalism." *Op.* p. 38, and,

> [i]f local hire is valid and each state may restrict to its own residents not only the utilization of its land and natural resources but also employment resulting from such use, then the concept of federalism would be effectively extinguished. Each state would become a separate and isolated enclave. I cannot believe that the Framers intended such a result and therefore conclude that the local hire statute is unconstitutional.

Op. p. 40, 41.

A SUBSTANTIAL QUESTION IS PRESENTED

A. The McCready v. Virginia Ownership Exception To The Privileges And Immunities of Citizenship Needs Limiting Clarification If Not Overruling

Appellants believe that Alaska Hire raises a fundamental privileges and immunities question common to all states. There are two classes of people who are treated differently in employment in substantially anything having to do with oil and gas activity in Alaska: residents of Alaska and residents of the other States. Appellants believe that the privileges and immunities section of Article IV of the United States Constitution was specifically enacted to preclude such disparate treatment.

The majority of the Alaska Supreme Court relied virtually exclusively upon a two-page opinion, *McCready* v. *Virginia,* 94 U.S. 391 (1877), in which this Court stated that fishing was not a privilege or an immunity of general citizenship and therefore Virginia "owning land under water adopted to the propagation and treatment of oysters" could grant its citizens exclusive use of it.

The Alaska majority notes that:

> *McCready* v. *Virginia, supra,* has been distinguished, but it has never been overruled. We have concluded that it states the principle applicable to the decision of this case.

Op. p. 23.

> The natural resources of Alaska 'belong' to Alaska and to Alaskans in a way that, in our federal system, Alaska's society and economy in general do not.

Op. p. 24.

> We rely on the McCready 'natural resources exception' to the privileges and immunities clause.

Op. p. 25.

Justices Boochever and Rabinowitz comment tellingly in their dissent on the foregoing. Because not susceptible to effective excerpting, their opinion should be read in its entirety. It sets forth fully appellants' position here and eloquently articulates why the question is substantial:

The majority opinion is based on an antiquated line of authority stemming from Corfield v. Corfield, (sic) 6 F.Cas. 546, 551-52 (No. 3,230) (C.C.E.D. Pa. 1823), where a local state fishery was held to be the common property of the people of the state. Accord, Geer v. Connecticut, 161 U.S. 519, 40 L.Ed. 793 (1896) (game birds); McCready v. Virginia, 94 U.S. 391, 24 L.Ed. 248 (1876) (fish). Each of the cases cited by the majority deals with fish or game. Corfield limited commercial fishing for shellfish to local fishermen; Geer pertained to game birds and McCready restricted the planting of oysters in Virginia waters to Virginians.

The application of these cases has been severely limited by Toomer v. Witsell, 334 U.S. 385, 92 L.Ed. 1460 (1948). There the Court pointed out that McCready was its only prior decision upholding discrimination against commercial fishing or hunting by citizens of other states without advancing 'persuasive independent reasons justifying the discrimination.' The court refused to extend McCready beyond its facts and struck down a law whereby shrimp boats belonging to South Carolina residents were licensed for substantially lower fees than those of nonresidents.

McCready was distinguished on two grounds. First, the Court pointed out that, in contrast to the Virginia oysters, the South Carolina shrimp were free-swimming and migrating. Secondly, it emphasized that McCready involved regulation of inland waters while Toomer involved the marginal sea. Thus, casting serious doubt on the continued authority of McCready, it concluded:

> These considerations lead us to the conclusion that the McCready exception to the privilege and immunity clause, if such it be, should not be expanded to cover this case.

A rationale for state action more in keeping with the mobility of modern society was advanced:

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States.

The majority bases its holding on the theory that the natural resources of Alaska 'belong' to Alaska and Alaskans. Under this rationale, it has been held that certain state resources may be restricted for state use. But the law here in question is not aimed at restricting oil and gas use to Alaska. In fact, the Alaska Pipeline has been constructed to the port of Valdez as a means of delivery of the oil to other states.

Even assuming McCready has continued viability, however, ready distinctions here, as in Toomer, render that case inapplicable. We are not dealing with any proprietary interest of a state in its fish and game. Nor is the statute with which we are concerned limited to the extraction of oil located on state lands. The Alaska act goes much further and restricts nonresident employment not only in extraction of a natural resource, but also in the distribution or any other use resulting from its extraction. In fact, employment on the pipeline involves construction of a distribution system rather than extraction of the oil.

Op. p. 32-35.

The problem with the entire ownership theory, which would allow Alaska to give preference to its own citi-

zens, is the inherent compromise of federalism. The dissenters note in this regard that:

> Moreover, the rationale behind the statute could be applied to all leases of state lands. Under the Alaska Statehood Act, Alaska was authorized to select in excess of 103,000,000 acres of land. As a condition to utilizing the natural resources, whether by mining, agriculture or timber industry, provisions in the leases could require preferential hire of residents. Such provisions could specify a local preference in all employment resulting from the leases. *Thus, nonresidents could be barred from dairy, agricultural, mining and lumber industries established on state lands, as well as from employment in any processing or manufacturing resulting therefrom. There is nothing in McCready to suggest that such a pervasive restriction of nonresident employment would be constitutionally permissible.*
>
> Certainly, Alaska has a major problem with unemployment. This problem is particularly acute in rural arctic communities which are faced with the inexorable change from their historic reliance on fish and game for subsistence. Hopefully, by means of valid enlightened legislation such as the Alaska Native Claims Settlement Act and the initiative of community leaders, these concerns may properly be addressed.
>
> In any event, preference for resident employees may not be upheld on the basis of the economic benefits derived by the state. . . *It takes little imagination to see that if Alaska's local hire law is constitutional because of economic benefits to its residents, each state could justify restricting to its own residents not only the utilization of its lands and natural resources, but also employment resulting from such use.* (emphasis supplied).

Op. p. 35-36.

In the very recent case of *Douglas* v. *Seacoast Products, Inc.,* decided on May 23, 1977, 45 L.W. 4488, this Court spoke of its displeasure with the ownership fiction:

> In any event, '[t]o put the claim of the State upon title is,' in Mr. Justice Holmes' words, 'to lean upon a slender reed.' Missouri v. Holland, 252 U.S. 416, 434 (1920). A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, have title to these creatures until they are reduced to possession by skillful capture. Ibid; Geer v. Connecticut, supra, 161 U.S. at 539-540 (Field, J., dissenting). The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' Toomer v. Witsell, 334 U.S. 385, 402 (1948); see also Takahashi v. Fish & Game Commission, 334 U.S. 410, 420-421 (1948). *Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution.* As we have demonstrated above, Virginia has failed to do so here. (emphasis supplied).

Our decision is very much in keeping with sound policy considerations of federalism. The business of commercial fishing must be conducted by peripatetic entrepreneurs moving, like their quarry, without regard for state boundary lines. Menhaden that spawn in the open ocean or in coastal waters of a southern State may swim into Chesapeake Bay and live there for their first summer, migrate south for the following winter, and appear off the shores of New York or Massachu-

setts in succeeding years. A number of coastal States have discriminatory fisheries laws, and with all natural resources becoming increasingly scarce and more valuable, more such restrictions would be a likely prospect, as both protective and retaliatory measures. Each State's fishermen eventually might be effectively limited to working in the territorial waters of their residence, or in the federally controlled fishery beyond the three-mile limit. Such proliferation of residency requirements for commercial fishermen would create precisely the sort of Balkanization of interstate commercial activity which the Constitution was intended to prevent. See, e.g., H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 532-539 (1949); cf. Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974). We cannot find that Congress intended to allow any such result given the well known construction of federal vessel licenses in Gibbons.

It is a slender reed which permits the State of Alaska to require private employers to discriminate against residents of other states in substantially all oil and gas related activities in Alaska.

The privileges and immunities clause requires that citizens of all states be treated equally. The classic statement of the scope of this doctrine is Justice Washington's opinion on circuit in *Corfield* v. *Coryell,* 6 F.Cas. 546 (No. 3,230) (C.C.E.D. Pa. 1823) upholding, as against a challenge by a Pennsylvania citizen, a New Jersey prohibition on the gathering of shell fish in New Jersey waters by anyone not "an actual inhabitant and resident" of New Jersey:

> '. . . The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their

> nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities. . .

The particular dangers of discrimination against nonresidents based on State ownership of resources has been pointed out by this Court in cases specifically related to oil and gas utilization.[8] In *Oklahoma* v. *Kan-*

[8] Even though these are commerce clause cases, their reasoning

sas Natural Gas, 221 U.S. 229 (1911), the Court struck down an Oklahoma statute which attempted to restrict the export of natural gas from the State. Oklahoma attempted to justify the restriction on the ground that because the resource belonged to the people of the State and could in fact be left undeveloped by the State, the State was free to impose any restriction it desired on what development did occur. The Court refused to sanction that sort of analysis, commenting that if the statute was allowed to stand, it would grant states powers which would literally destroy the nation. In the Court's words:

> If the States have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its lumber, the mining States their minerals. And why may not the products of the field be brought within the principle. . . . If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at State lines. And yet we have said that in matters of foreign and interstate commerce there are no State lines. In such commerce, inside of the States a new power appears and a new welfare—a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made greater by a division of its resources, naturally and claimed, with every other State and those of every other State with it.

Of similar import is *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923). There, the statute before the Court was a West Virginia provision directed toward keeping within the State all natural gas there

is appropriate to any purported balance of state ownership with the privileges and immunities of citizenship.

produced which was required for local needs. The Court held that a State could not accord to its own consumers a preferred right of purchase over consumers in other States. *See also, Foster Fountain Packing Co.* v. *Haydel,* 278 U.S. 1 (1928) and *Takahashi* v. *California Fish and Game Commission,* 334 U.S. 410 (1948).

B. A Special Public Interest Does Not Justify Alaska Hire Or Abridgement of The Privileges and Immunities of Citizenship

Notwithstanding its legislative findings (AS 38.40. 010, 020) Alaska Hire is not minority hire, local hire or unemployment hire. Rather *all* Alaska residents are given preference in hire. Even if there were special unemployment problems in Alaska which could justify discrimination then it is those persons who should be given preference, not all residents.

In fact, the majority notes:

> The challengers point out that the least drastic, and also the most effective, means to help the unemployed and recent trainees to find jobs, is to give an employment preference only to the unemployed and recent trainees.

Op. p. 13.

This reasoning was applied by the majority to the defeat of the durational residency requirement under the equal protection clause and is equally apt in its application to the privileges and immunities problem presented here. Moreover, perceived unemployment problems of one state do not justify discrimination against the residents of the other states. *See Edwards* v. *California,* 314 U.S. 160 (1941), *infra.*

In *Toomer* v. *Witsell,* 344 U.S. 385 (1948), a nonresident fishing restriction case, this Court stated:

> The primary purpose of this [privileges and immunities] clause, like the clause between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation. 'Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privileges with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.' *Paul* v. *Virginia,* 8 Wall (U.S.) 168, 180, 19 L.Ed. 357, 360 (1868).
>
> In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.

Graham v. *Richardson,* 403 U.S. 365 (1971), is helpful as well. The Court held, *inter alia,* that state statutes which denied welfare benefits to resident aliens or to aliens who had not resided in the United States for a given number of years were unconstitutional under the equal protection clause of the Fourteenth Amendment. The two states involved sought to justify their restrictions on eligibility of aliens for public assistance solely on the basis of the states' "special public interest" in favoring its own citizens over aliens in the distribution of limited resources such as welfare benefits. The Court noted, however, that *Takahaski* v. *Fish and Game Commission,* 334 U.S. 14, 92 L.Ed. 1478 (1948) cast doubt on the continuing validity of the special public interest doctrine in all contexts. The Court had held there that California's purported ownership of fish in the ocean off its shores was not such a special public interest as would justify prohibiting aliens from making a living by fishing in those waters while permitting all others to do so. The Court held there:

> The Fourteenth Amendment and the laws adopted under its authority best embody a general policy that all persons lawfully in this country shall abide 'in any state' on any quality of legal privileges of all citizens under non-discriminatory laws. 334 U.S. 419.

The Court in *Graham* held:

> Whatever may be the contemporary vitality of the special public-interest doctrine in other contexts after *Takahashi,* we conclude that a state's desire to preserve limited welfare benefits for some citizens is inadequate to justify Pennsylvania making non-citizens ineligible for public assistance and Arizona restricting benefits to citizens and long-time resident aliens. First, the special public interest doctrine was heavily grounded on the notion that 'whatever is a privilege rather than a right may be made dependent upon citizenship.' (citation omitted). But this court now has rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' or as a 'privilege.' (citations omitted).

Ibid, p. 543.

C.D.R. Enterprises Limited v. *Board of Education, City of New York, et al.*, 412 F.Supp. 1164 (1976) is instructive.[3] There a three-judge district court held that insofar as a New York statute granted a preference for employment in public construction projects to citizens over aliens who were lawfully admitted residents, the statute was unconstitutional. The stated purpose of the New York law was to reduce local unemployment:

> The determination of whether there is a constitutional distinction between 'preference' and 'exclusion' cannot be based on the superceded doctrine of *Crane*. The *State has a duty to all its lawful residents, resident alien or citizen. We must try to see to it that they do not starve, that they have equal access to state public employment, as well as membership in the bar, and that they have equal access to private employment. Truax v. Raich, supra. Its duty to reduce unemployment is as much a duty to the alien as to the citizen for the very reasons stated by Mr. Justice Blackmun and Mr. Justice Powell* [in *Graham* v. *Richardson*, 403 U.S. 365, 29 L.Ed.2d 534 (1971)]. *See, State* v. *Wylie*, 516 P.2d 142, 149 (Ak. 1973). Discrimination against a class of 'persons' (resident aliens) who are house painters has even less justification in support than discrimination against the same class (resident aliens) for managerial positions in the civil service. (emphasis added).

Ibid, p. 1170.

In discussing *Graham*, the panel observed:

> In *Graham*, which involved the right to welfare assistance, the court held that even though getting enough food to live could be considered a privilege, public assistance could, nevertheless, not be denied a resident alien. The next question is obviously whether the right to work is not as much protected as the right to eat.

[3] Affirmed by this Court in Case No. 75-1817, —— U.S. ——, 97 S.Ct. 721 (1977).

Ibid, p. 1169.

The court concluded in the affirmative. Its reasoning should be as applicable to citizens of the other states as well as resident aliens.

In *Edwards* v. *California*, 314 U.S. 160 (1941), this Court ruled that the State of California could not make it a crime for a person to assist in bringing into the State of California an indigent person. In the Opinion of the Court as authored by Mr. Justice Byrnes it was held:

> . . . The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. It is not for us to say that this is not true. We have repeatedly and recently affirmed, and we now reaffirm, that we do not conceive it our function to pass upon 'the wisdom, need, or appropriateness' of the legislative efforts of the States to solve such difficulties . . .
>
> But this does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders. It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the

outside world. But, in the words of Mr. Justice Cardozo: 'The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division.' Baldwin v. Seelig, 294 U.S. 511, 523.

CONCLUSION

It is submitted that the opinion of the Supreme Court of Alaska impermissibly endorses parochial isolation and Balkanization to the detriment of the privileges and immunities of the residents of the other states. This question is of substantial constitutional and national stature so as to merit plenary treatment by the Court.

RESPECTFULLY SUBMITTED at Anchorage, Alaska, this 29th day of August, 1977.

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APPENDIX

APPENDIX I

IN THE SUPREME COURT OF THE STATE OF ALASKA

File No. 3025

Opinion

[No. 1435—June 3, 1977]

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN, *Appellants,*

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska, *Appellees.*

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, J. Justin Ripley, Judge.

Appearances: Robert H. Wagstaff, of Wagstaff and Middleton, Anchorage, for Appellants. Ronald W. Lorensen, Assistant Attorney General, and Avrum M. Gross, Attorney General, Juneau, for Appellees.

Before: Boochever, Chief Justice, Rabinowitz, Connor, Erwin, and Burke, Justices.

CONNOR, *Justice.*

BOOCHEVER, *Chief Justice,* with whom RABINOWITZ, *Justice, joins, dissenting in part.*

I

This case considers the constitutionality of the "Alaska Hire" law, AS 38.40. "Alaska Hire," enacted in 1972 and amended in 1976, requires that all oil and gas leases, easements or right-of-way permits for oil or gas pipelines, unitization agreements or any renegotiation of any of these to which the state is a party, contain a requirement that qualified Alaska residents be hired in preference to nonresidents. The statute does not apply to other private employment, nor to public employment.[1] AS 38.40.090(1) defines a resident for these purposes as a person meeting five criteria there listed, of which the most important is that the person must have been physically present in the state, with certain exceptions, for one year.[2]

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[1] The number of jobs covered by the law varies with the number and size of petroleum and pipeline projects in progress. In June 1976, the commissioner of labor testified that it applied to about 12,000 jobs, approximately 6 percent of the total employment in the state.

Alaska Hire applies to the oil pipeline now in the final stages of construction. It will apply to any natural gas pipeline. Should any oil and gas leases ever be renegotiated, it will apply to them. It will apply to offshore oil and gas development under state leases. The present North Slope oil and gas leases are not covered since they were entered into prior to July 7, 1972, the effective date of AS 38.40. *See* AS 38.40.050(a).

[2] AS 38.40.090(1) reads:

"'resident' means a person who

(A) except for brief intervals, military service, attendance at an educational or training institution, or for absences for good cause, is physically present in the state for a period of one year immediately before the time his status is determined;

(B) maintains a place of residence in the state;

(C) has established residency for voting purposes in the state;

(D) has not, within the period of required residency, claimed residency in another state; and

(E) shows by all attending circumstances that his intent is to make Alaska his permanent residence."

The law was not seriously enforced until 1975, when the state department of labor began issuing residency cards to those who met the statutory standards, and dispatching to pipeline jobs only persons with cards. This suit was filed shortly thereafter.

The eight plaintiffs, appellants here, include non-residents (some of whom have worked on the oil pipeline in the past), persons who have been residents less than one year, and a life-long resident who is not considered a resident for Alaska Hire purposes since he was out of the state for several months last year. The defendants and appellees are Edmund Orbeck, commissioner of labor, and Guy Richard Martin, commissioner of natural resources. They will be referred to as "the state."

The plaintiffs make two major arguments: that the one-year durational residency requirement violates the state and federal equal protection clauses, and that any residency requirement violates the privileges and immunities clause of Article IV of the United States Constitution.[3]

By consent of the parties, consideration of the motion for preliminary injunction and of the merits was consolidated. The case was submitted on affidavits, depositions, and memoranda of law. No oral testimony was taken. On July 21, 1976, the superior court upheld the law in its entirety and entered judgment in favor of the defendant state officials. This appeal was filed the following day.

Preliminary, the state asserts that the plaintiffs are not entitled to bring this suit because they lack standing and failed to exhaust their administrative remedies. We find these contentions without merit.

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[3] We agree with the trial court that the plaintiffs/appellants have abandoned their third, fourth, and fifth causes of action, under the due process, eminent domain, and ex post facto clauses. See Maloney v. Brandt, 123 F.2d 779, 782 (7th Cir. 1941); Lewis v. State, 469 P.2d 689, 691-92 n.2 (Alaska 1970). We therefore do not consider them.

Five of the plaintiffs have sworn under oath that they are not residents of Alaska. Under AS 38.40.090(1)(D), they are not eligible to receive residency cards, and, since the department of labor cannot waive the statutory criteria, pursuit of administrative remedies would be useless. *See Weinberger* v. *Salfi*, 422 U.S. 749, 765, 45 L.Ed.2d 522, 538-39 (1975); *Pence* v. *Morton*, 391 F. Supp. 1021, 1025 n.3 (D. Alaska 1975), *rev'd on other grounds* (and this holding approved), 529 F.2d 135, 143 (9th Cir. 1976). Therefore, they have standing to challenge the residency requirement.

Plaintiffs Browning and Dorman are residents who have not lived in Alaska for one continuous year. Under the statute, they are ineligible for residency cards, and administrative remedies could not make them eligible. They therefore have standing to challenge the one-year residency requirement.[4]

Browning and Dorman executed their affidavits in May 1976. Since the preparation of the record on appeal, they may have met the one-year residency requirement. If so, the case is technically moot as to them. Nevertheless, we will address their contentions as though they were not moot, under the recognized exception to the mootness doctrine for cases "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515, 55 L.Ed. 310, 316 (1911); *see, e.g., Dunn* v. *Blumstein*, 405 U.S. 330, 333 n.2, 31 L.Ed.2d 274, 279 n.2 (1972); *Doe* v. *State*, 487 P.2d 47, 53-54 (Alaska 1971). Challenges to one-year residency requirements can seldom be pursued through both trial and appellate stages within the one year in which a given plaintiff is aggrieved. Yet there will always be others who have been residents for less than one year.

[4] Since the other plaintiffs have standing to seek all the relief requested, we find it unnecessary to consider whether plaintiff Hicklin was properly made a party to this suit, whether he has standing, and whether he should have pursued administrative remedies.

If we required one of them to begin a new suit, it would probably be moot before appellate review could be obtained. There would never be a decision on the merits.

II

Durational residence requirements are subject to strict scrutiny under the equal protection clauses of the federal and state constitutions because they penalize those who have exercised their fundamental right of interstate migration.[5] *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 39 L.Ed.2d 306 (1974) (nonemergency medical care at public expense, 1 year); *Dunn* v. *Blumstein*, 405 U.S. 330, 31 L.Ed.2d 274 (1972) (voting, 1 year); *Shapiro* v. *Thompson*, 394 U.S. 618, 22 L.Ed.2d 600 (1969) (welfare benefits, 1 year); *Gilbert* v. *State*, 526 P.2d 1131 (Alaska 1974) (legislative candidacy, 3 years, upheld); *State* v. *Adams*, 522 P.2d 1125 (Alaska 1974) (divorce, 1 year); *State* v. *Wylie*, 516 P.2d 142 (Alaska 1973) (public employment, 1 year); *State* v. *Van Dort*, 502 P.2d 453 (Alaska 1972) (voting, 75 days).

Under strict scrutiny, the law must be struck down unless the state can demonstrate that it is necessary to further a compelling state interest, and is the least drastic means available to further that interest. *Dunn* v. *Blumstein*, *supra* at 342-43, 31 L.Ed.2d at 284-85.[6]

[5] The phrase "right to travel" is often used. But in cases challenging durational residency requirements, the right at stake is to travel into a different state and make one's home there, not merely to travel. Memorial Hospital v. Maricopa County, 415 U.S. 250, 255, 39 L.Ed.2d 306, 313 (1974).

This right nowhere appears in the black letter of the United States Constitution, although it did appear in the Articles of Confederation. United States v. Guest, 383 U.S. 745, 758, 16 L.Ed.2d 239, 249 (1964). Nevertheless, it can no longer be disputed that it is a fundamental right calling for strict scrutiny. Shapiro v. Thompson, 394 U.S. 618, 629-31, 22 L.Ed.2d 600, 612-13 (1969).

[6] This is a question of law, not one of fact. On appeal we examine

In its two most recent durational residency cases, the United States Supreme Court has abandoned this standard. *Maricopa, supra* (striking down a 1-year requirement for non-emergency medical care at public expense); *Sosna* v. *Iowa*, 419 U.S. 393, 42 L.Ed.2d 532 (1975) (upholding a 1-year requirement for divorce). In *Maricopa* the Court was concerned with the nature of the public benefit withheld during the waiting period, stating that a durational residency requirement will be struck down only if it penalizes the right of migration by depriving the recent migrant of a basic necessity of life. This was not enunciated in *Sosna*, although it is an entirely plausible explanation for *Sosna* as well. It has been criticized from a variety of viewpoints. *See, e.g., Maricopa, supra*, at 284-88, 39 L.Ed.2d at 329-32 (Rehnquist, J., dissenting); Barrett, Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?, 1976 *B.Y.U. L. Rev.* 89, 118-20; Comment, A Strict Scrutiny of the Right to Travel, 22 *U.C.L.A. L. Rev.* 1129 (1975).

We have never used this "basic necessities" reasoning. *See generally Comment*, Durational Residency Requirements: The Alaskan Experience, 6 *U.C.L.A.-Alaska L. Rev.* 50 (1976). On the other hand, our use of strict scrutiny has not always resulted in holding challenged laws unconstitutional. In *Gilbert* v. *State, supra*, we upheld the 3-year residency requirement for members of the legislature imposed by Article II, section 2 of the Alaska Constitution. We held that it was the least restrictive means available to further the compelling state interests in having the voters familiar with their legislators, and legislators familiar with the state and its problems.

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it de novo. Drope v. Missouri, 420 U.S. 162, 174-75 & n.10, 43 L.Ed. 2d 103, 115 & n.10 (1975); Fortin v. Darlington Little League, Inc., 514 F.2d 344, 348-49 (1st Cir. 1975). If the rule were to the contrary, a trial court decision upholding a law would preclude us from engaging in strict scrutiny unless we considered the decision clearly erroneous.

With that background, we proceed to subject the Alaska Hire law to strict scrutiny. The principal precedent is *State* v. *Wylie, supra*, in which we held unanimously that the state could not give a preference in public employment to persons who had lived in Alaska for a year before applying.

The interests which the state seeks to further through the Alaska Hire law are similar to those which were claimed to be "compelling" in *Wylie*. They are set forth in AS 38.40.010 and .020.[7] Through Alaska Hire, the state seeks to reduce the high unemployment rate for Alaska residents, and to use the extraction of Alaska's natural resources as an opportunity to cultivate its human resources.[8] Reducing unemployment, the state said in *Wylie*,

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[7] These sections read:

"Sec. 38.40.010. State policy. It is the policy of the state in the development of its natural resources to seek and accomplish the development of its human resources by providing maximum employment opportunities for its residents in conjunction with natural resource management.

"Sec. 38.40.020. Legislative findings. The legislature finds that Alaska has a uniquely high unemployment record among the states due both to cultural and geographical migration barriers which record has existed for many years and which experts have attested will persist without drastic governmental intervention. The legislature further finds that employment opportunities which from time to time occur in the areas of the state suffering from the largest chronic unemployment problem are nonrecurring and usually relate to the exploitation of the state's natural resources and that the state has an obligation to assure that the benefits of this employment enure to the residents of the state."

[8] Article VIII, section 2 of the Constitution of Alaska reads:

"The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, *for the maximum benefit of its people.*" (Emphasis added.)

The section is not limited to those of Alaska's people who have been here for at least twelve months.

was also the goal of a durational residency requirement for civil servants.

In *Wylie*, we found that a durational residency requirement for civil servants was not the least drastic means to further this governmental interest. 516 P.2d at 149. Indeed, we seriously questioned whether it furthered that interest at all. Unemployment in Alaska, we noted, is caused in large part by lack of education and vocational training, and there are few jobs—public or private—in rural areas where unemployment is highest. The durational residency requirement did not increase the number of jobs, nor did it necessarily hold down immigration into the state. *Id.* Job training, we suggested, would probably be a more effective way to reduce unemployment, and would not discriminate against recent migrants. *Id.* at 149 n.14.

The superior court found that each of these concerns of *Wylie* is met by AS 38.40 and the manner in which the state has implemented it. Pipeline jobs are mostly in the rural areas and workers are not required to permanently relocate themselves and their families to their place of employment. The workers are fed and housed by their employers and they are able to return to their homes and families during vacation periods. On the other hand, workers are dispatched to many such jobs from union halls in Fairbanks or Anchorage.

The state initiated a training program for unskilled Alaskans with commencement of pipeline construction. It is necessary, the state argues, that the trainees have some guarantee that jobs will be awaiting them if they are to make the commitment of time and effort necessary to leave their rural homes to enter and complete a job training program.

Unlike the situation in *Wylie*, most of the projects covered by Alaska Hire are and will be of a "boom," short-durational nature. If a trainee is to apply the benefits of

his training by getting a job on such a project, he cannot be made to wait until all new arrivals, who may be in a more job-competitive position, have been hired. The project would be completed before that happened.

To state the differences between the facts of this case and *Wylie* is not to decide the issue. There are countervailing considerations.

The extent to which the Alaska Hire law in fact benefits unemployed Alaskans and those in job training is questionable. Alaska Hire does not distinguish among those who have been one-year residents; it gives all of them an absolute preference over those who are not one-year residents. A lifelong Alaskan employed in a private business or the public sector would be entitled to preference under Alaska Hire if he sought a new job. An unemployed person, or one who had just completed a private or public training course qualifying him for pipeline or petroleum employment, but who had taken an extended trip outside the state eleven months earlier, would be unable to obtain preference.[9]

While under strict scrutiny the correlation between the classification made by the statute and the goals sought to be achieved need not be perfect, it must be sufficiently strong that the classification is the least drastic means to achieve those ends. We cannot say that a one-year durational residency requirement is the least drastic means available to the state in its quest for reduced unemployment and a stabilized economy. Therefore, we hold that AS 38.40.090(1)(A) violates the equal protection clauses of the federal and state constitutions.[10] The challengers point

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[9] Plaintiff Hicklin was born in Alaska and has lived here all his life. He was denied a residency card because he had just returned from six and a half months in the state of Washington where he helped his father build a house.

[10] The state offers as an alternative justification for Alaska Hire,

out that the least drastic, and also the most effective, means to help the unemployed and recent trainees to find jobs, is to give an employment preference only to the unemployed and recent trainees.

The state stresses an additional fact not present in *Wylie*. In the industries covered by Alaska Hire, there are pools of migratory skilled workers. When a project is complete, they tend not to remain in the area, but to travel to another major construction project or petroleum development elsewhere. Such persons, the state points out, often have a highly mobile lifestyle and in a very short time could acquire the indicia of Alaska residence—mailing address, voter registration, driver's license, auto registration. A durational residency requirement, and not merely a residency requirement, is needed, according to the state, in order to strengthen the local economy and labor force by giving preference to Alaskans who lived here previously and are more likely to stay when the oil and gas project is completed. And we shall demonstrate later in this opinion, Alaska Hire is not invalid in its entirety, and there are steps Alaska can constitutionally take to insure that the preference goes only to *bona fide* residents. Our holding is merely that it sweeps too broadly to define *bona fide*

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in addition to its police power, the state's proprietary power over the resources it owns. The state asserts it is not subject to the equal protection clause in the management of its property. This is not the law. State v. Wylie, 516 P.2d 142, 146 (Alaska 1973), made it clear that the state in its capacity as *employer* must obey the Fourteenth Amendment. The state as a trustee of property must obey the Fourteenth Amendment. Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230, 1 L.Ed.2d 792 (1957). The Fourteenth Amendment applies equally to a state or city using the police power to regulate private businesses (Turner v. City of Memphis, 369 U.S. 350, 7 L.Ed.2d 762 (1962) (racial segregation in restaurants) and using its proprietary powers to manage its own property (Holmes v. City of Atlanta, 350 U.S. 879, 100 L.Ed. 776 (1955), *vacating* 223 F.2d 93 (5th Cir.) (racial segregation of municipal golf courses).

residency so that no one may qualify until he or she has lived in Alaska for one year.

Nor do the cases upholding a one-year residency requirement for reduced public college tuition support the one-year requirement of Alaska Hire. Those requirements, like Alaska Hire, were enacted to deny the benefit to those who had become residents of the state only upon enrolling at the college. *Starns* v. *Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971); *Vlandis* v. *Kline*, 412 U.S. 441, 452, 37 L.Ed.2d 63, 72 (1973) (dictum). But Alaska Hire would resemble an absolute preference in enrollment for one-year residents, not a reduced tuition rate. Those cases do not support such an absolute preference, nor do any others.

The state also suggests that our scrutiny should be less strict because Alaska Hire does not bar non-residents from employment, but merely gives a preference to residents. But as long as there are available Alaska residents, it *is* a bar to those who cannot meet the residency standards. Be it bar or preference, the appellants have sought jobs on the pipeline, but have been unsuccessful because of the Alaska Hire law. A state labor official testified that about 74 percent of the pipeline workforce meet the Alaska Hire residency requirements.

III

The appellants also challenge the constitutionality of the remainder of the Alaska Hire law which, after AS 38.40.090 (1)(A) is stricken, limits these petroleum and pipeline jobs to residents of Alaska. They allege that it violates both the equal protection and privileges and immunities clauses.

A residency requirement does not penalize the right of interstate migration, unlike a durational residency requirement, because it does not burden those who have recently migrated interstate. Hence it is not subject to strict scrutiny

on that ground. *See McCarthy* v. *Philadelphia Civil Service Comm.*, 424 U.S. 645, 646-47, 47 L.Ed.2d 366, 367-68 (1976); *Lynden Transport, Inc.* v. *State*, 532 P.2d 700, 706-07 (Alaska 1975).

Appellants ask that strict scrutiny be applied to the residency requirement because it infringes a claimed fundamental right to work. We have concluded, like the U.S. Supreme Court in *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 313, 49 L.Ed.2d 520, 524 (1976), that this is not a fundamental right calling for strict scrutiny.[11]

Article I, section 1 of our Constitution states that all people are entitled to "the enjoyment of the rewards of their own industry." That clause, and the indisputable truth that gainful employment is an economic necessity for most people, do not persuade us to apply strict scrutiny. In *Wylie*, notwithstanding that clause, we noted in dictum that the state could impose a residency requirement at the time of application upon applicants for public employment. 516 P.2d at 150 n.15.

We are troubled by the possible ramifications of holding that the right to work is a fundamental right. Our statutes impose prerequisites of varying severity for licenses to

[11] Three cases which are often cited for the existence of such a fundamental right can be explained on other grounds. Traux v. Raich, 239 U.S. 33, 41, 60 L.Ed. 131, 135 (1915), decided decades before the concept of strict scrutiny and multi-tier equal protection review was developed, and Purdy & Fitzpatrick v. State, 456 P.2d 645, 654 (Cal. 1969), both would merit strict scrutiny because the laws in question discriminated against aliens, a "suspect class." Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 539 (Cal. 1971), concerned a law which restricted employment opportunities on the basis of sex, a classification which a number of cases including *Sail'er Inn* have held justifies strict scrutiny regardless of the rights or privileges affected. The California Supreme Court, after *Purdy and Sail'er Inn*, refused to apply strict scrutiny to the laws establishing the qualifications for practicing medicine. D'Amico v. Board of Medical Examiners, 520 P.2d 10, 22-23 (Cal. 1974).

pursue many occupations and professions. May the state, for example, require that professionals have graduated from accredited institutions of learning (*e.g.* AS 08.08.130 (4) & AS 08.80.110(3)) only if it can demonstrate to the court that this is the least drastic means to further a compelling state interest? What would be the fate under strict scrutiny of AS 23.40.110(b), which permits union shop or agency shop agreements for public employees? A "fundamental right" of the character suggested by the appellants might unduly constrict the legislature's ability to respond to perceived public needs, without any corresponding benefit to personal liberty or the public good.[12]

Appellants' alternative argument for strict scrutiny of the residency requirement is that non-residents should be declared a suspect class under Alaska's Constitution and therefore entitled to the additional protection of strict

[12] The differences between rights which are "fundamental" and those which are not are analyzed at length in San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 98-110, 36 L.Ed.2d 16, 81-88 (1973) (Marshall, Jr., dissenting), and Developments in the Law—Equal Protection, 82 *Harv. L. Rev.* 1965, 1127-31 (1969). Both Justice Marshall and the Harvard commentators reach the conclusion that rights are considered "fundamental" simply because they are believed to be more important than other personal or economic interests. 411 U.S. at 100, 36 L.Ed.2d at 82; 82 *Harv. L. Rev.* at 1128. A balancing of the state's interests and those of the individual is implicit. 411 U.S. at 108, 36 L.Ed.2d at 87; 82 *Harv. L. Rev.* at 1132.

Justice Marshall, citing his *San Antonio* dissent, dissented in Mass. Board of Retirement v. Murgia, *supra*. But he did not believe that the right to work was a fundamental right invoking strict scrutiny; he urged that laws infringing that right be tested by the standard used in cases such as Reed v. Reed, 404 U.S. 71, 30 L.Ed.2d 225 (1971). This is the standard we adopted in Isakson v. Rickey, 550 P.2d 359 (Alaska 1976). His objection was to the use of the extremely deferential standard of City of New Orleans v. Dukes, 427 U.S. 297, 49 L.Ed.2d 511 (1976), which we no longer use in testing laws against the Alaska Constitution. 427 U.S. 307, 317-23, 49 L.Ed.2d 420, 527-31.

scrutiny for laws which impose disabilities upon them. They base this argument on cases holding that aliens are a suspect class under the federal Constitution.[13] This argument is undercut by *Mathews* v. *Diaz*, 426 U.S. 67, 84-87, 48 L.Ed.2d 478, 493-94 (1976), holding unanimously that alienage is a suspect classification only for state laws, not for federal laws. Alienage most obviously differs from nonresidence in a state because of the difficult and time-consuming process required to become a U.S. citizen, as opposed to the ease with which a person can change his residence to a new state. In addition, the plenary power of the political branches of the federal government to exclude and control aliens has no equivalent in the state government, which cannot similarly exclude or control U.S. citizens resident in other states. *See id.* at 86 n.26, 48 L.Ed.2d at 493-94 n.26.

We do not believe it would be reasonable to require a state to meet the exceedingly exacting standards of strict scrutiny on all the numerous occasions when it seeks to benefit its residents—those who pay its taxes and elect its officers—in preference to persons who reside elsewhere.

Since there is no ground for applying strict scrutiny to the residency requirement, we must use the lower standard of review. Under the state Constitution, the test is laid out in *Isakson* v. *Rickey*, 550 P.2d 359 (Alaska 1976): the classification must bear a fair and substantial relation to a permissible state interest. Under the federal Constitution, the test is much more deferential: the law is to be upheld if

[13] Sugarman v. Dougall, 413 U.S. 634, 37 L.Ed.2d 853 (1973) (civil service); Graham v. Richardson, 403 U.S. 365, 29 L.Ed.2d 534 (1971) (welfare); Takahashi v. Fish & Game Comm.; 334 U.S. 410, 92 L.Ed. 1478 (1948) (commercial fishing); C.D.R. Enterprises, Ltd. v. Board of Education, 412 F. Supp. 1164 (E.D.N.Y. 1976), *aff'd*, —— U.S. ——, 50 L.Ed.2d 742 (1977) (employment on public works). In all these cases, the state discriminated between resident citizens and resident aliens, not between residents (citizen or alien) and non-resident (citizen or alien).

the legislature could have had any conceivable basis to believe that it furthered a permissible state interest. *E.g., City of New Orleans* v. *Dukes*, 427 U.S. 297, 49 L.Ed.2d 511 (1976).

Since the distinction made by Alaska Hire between residents and non-residents bears a close correlation to the state's interest in providing economic benefit to residents, the subject of dispute is whether this interest is a permissible one for the state to promote. *See Lynden Transport, Inc.* v. *State*, 532 P.2d 700, 709-11 (Alaska 1975); Tussman and tenBroek, The Equal Protection of the Laws, 37 *Calif. L. Rev.* 341, 362-64 (1949); Developments in the Law—Equal Protection, 82 *Harv. L. Rev.* 1065, 1081 (1969). This is the subject of the privileges and immunities clause of Article IV of the United States Constitution, to which we now turn our attention.

Article IV, section 2, of the federal Constitution says that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[14] The privileges and immunities clause is not an absolute; the standard of review is similar to that which we established in *Isakson* v. *Rickey*, *supra*, for equal protection review. *Compare Toomer* v. *Witsell*, 334 U.S. 385, 396, 92 L.Ed. 1460, 1471 (1948) *with Isakson*, *supra*, 550 P.2d at 362 (Alaska 1976).

> "Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether

[14] Alaska's Constitution has no privileges and immunities clause.

> such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures."

Toomer, 334 U.S. at 396, 92 L.Ed. at 1471, quoted in *Lynden Transport, Inc.* v. *State*, 532 P.2d 700, 709 (Alaska 1975) (footnote omitted).[15]

The standard list of "privileges and immunities" is from the opinion of Mr. Justice Bushrod Washington, sitting on circuit in 1823, in *Corfield* v. *Coryell*, 6 F. Cas. 546, 551-52 (No. 3,230) (C.C.E.D. Pa. 1823). It is, he said, limited to "those privileges and immunities which are, in their nature, fundamental."[16] It includes "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise." In *Corfield*, a Pennsylvanian challenged a New Jersey law which limited commercial fishing for shellfish to local fishermen. The law was upheld, on the ground that the fishery was the common property of all the people of New Jersey, and could be limited to them. *Accord*, *Geer* v. *Connecticut*, 161 U.S. 519, 40 L.Ed. 793 (1896) (game birds); *McCready* v. *Virginia*, 94 U.S. 391, 24 L.Ed. 248 (1877) (fish). *Corfield* thus set forth both the rule and the exception, both of which are relevant to this case.

These cases were distinguished in *Toomer, supra*, which struck down a prohibitively high license fee for out-of-

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[15] *Cf.* In re Griffiths, 413 U.S. 717, 722 n.8, 37 L.Ed.2d 910, 915 n.8 (1973): "Discrimination or segregation [of aliens or non-white persons] for its own sake is not, of course, a constitutionally permissible purpose."

[16] It is longer than the list of fundamental rights which invoke strict scrutiny under the equal protection clause.

state commercial fishermen.[17] The shrimp in *Toomer*, unlike the fish in inland waters involved in *McCready*, migrated along the coast of a number of states and could not be said to belong to any of them. 334 U.S. at 399-403, 92 L.Ed. at 1473-75.[18] The state's "ownership" is less of a legal fiction in this case than it is with respect to fish and game. Alaska Hire does not apply to all jobs in extractive industries, but only those on projects to which the state government has a contractual nexus. *See generally* Alleyne, Constitutional Restraints on the Preferential Hiring of Alaskan Residents for Oil Pipeline Construction, 2 *U.C.L.A.-Alaska L. Rev.* 1, 3-8 (1972).

McCready v. *Virginia, supra*, has been distinguished, but it has never been overruled. We have concluded that it states the principle applicable to the decision of this case. Article VIII, section 2 of the Alaska Constitution, stating that Alaska's natural resources shall be used and developed in ways that will benefit Alaska's people, is not inconsistent with the privileges and immunities clause. The natural resources of Alaska "belong" to Alaska and to Alaskans in a way that, in our federal system, Alaska's society and economy in general do not.

Appellants, of course, strenuously object to this line of reasoning. They correctly point out that, under *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 67 L.Ed. 1117 (1923) and *West* v. *Kansas Natural Gas Co.*, 211 U.S. 229, 55 L.Ed.

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[17] *Accord*, Mullaney v. Anderson, 342 U.S. 415, 96 L.Ed. 458 (1952) (striking down a similar law of the Territory of Alaska).

[18] This issue is before the United States Supreme Court again this year. Massachusetts v. Westcott, No. 75-1775, *cert. granted*, 50 L.Ed.2d 74 (1976), *argued*, 45 U.S.L.W. 3504 (Jan. 17, 1977). *Westcott* concerns a state law limiting certain offshore fisheries to one-year residents. The Supreme Judicial Court of Massachusetts concluded that it violated the privileges and immunities clause, citing *Toomer*. Commonwealth v. Westcott, 344 N.E.2d 411 (Mass. 1976).

716 (1911), Alaska could not allow the export of oil or gas only after all local needs were met. But these cases were decided under the commerce clause, not the privileges and immunities clause. One of the principal reasons the United States Constitution was written, to replace the old Articles of Confederation, was to make the United States a single economic unit, without barriers to interstate trade. *See generally H.P. Hood & Sons* v. *DuMond,* 336 U.S. 525, 530-39, 93 L.Ed. 865, 870-75 (1949). Laws forbidding or burdening exports from a state, or imports into it, are inconsistent with that principle.

But no commerce clause claim is advanced against Alaska Hire. Accepting the premise that the United States has and should have one common economy, we do not accept the offered conclusion that the government of Alaska can never make benefits available to citizens of Alaska in preference to citizens of other states.

Edwards v. *California,* 314 U.S. 160, 86 L.Ed. 119 (1941), does not compel a decision to the contrary. In *Edwards,* the Court held invalid a state law making it a crime to assist indigent non-residents to come into the state. In purpose and in effect, the law was a direct barrier to interstate travel and migration. Alaska Hire does not erect a barrier to interstate travel or migration. With the durational residence requirement stricken, it permits new as well as long-time residents to receive a preference. It gives the state's benefits to those who bear its burdens, without placing any limitation on who may voluntarily assume those benefits and burdens.

We rely on the *McCready* "natural resources exception" to the privileges and immunities clause. The trial court, on the other hand, upheld the law on the ground that it was not economic protectionism for its own sake, and so fell within the "independent reasons" exceptions to the privileges and immunities clause articulated in the quotation from *Toomer, supra.* The trial judge referred to Alaska

Hire as an attempt to solve "problems that may be typified as social, racial, educational, and economic." We are hesitant to classify Alaska Hire as something other than an attempt to strengthen the Alaskan economy. In *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U.S. 511, 523, 79 L.Ed. 1032, 1038 (1935), a commerce clause case, the Supreme Court rejected an attempt to justify regulation of the price of imported milk by analogy to regulation of its purity, which would unquestionably be valid. We believe that the better alternative is to consider Alaska Hire an economic measure justified by the "natural resources exception," the principle that a state may prefer its residents in dealing with natural resources it owns.

IV

Appellants also challenge the constitutionality of the four indicia of residence other than duration listed in AS 38.40.090(1): maintaining a place of residence in Alaska, residency for voting purposes, no claim of residency elsewhere, and an intent shown by all attending circumstances to be a permanent resident. We find no constitutional fault with any of them, and use our discussion of them to outline in some detail the standards which will govern determination of Alaska residence for the purposes of AS 38.40.[19]

Maintaining a place of residence simply means being ordinarily physically present in Alaska, having a place within Alaska where one ordinarily stays, and having no such place anywhere else. The department of labor con-

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[19] *See* SLA 1972, ch. 191, § 2, part of the original Alaska Hire act:

> "If a court of competent jurisdiction invalidates any of the criteria or tests of residency in sec. 90 of this chapter, the term 'resident' then means a person who satisfies the remaining criteria or tests not invalidated, and this chapter shall be administered and enforced accordingly."

See also the severability clause of general application, AS 01.10.030.

siders that a construction camp may meet this requirement.

Residency for voting purposes, under *State* v. *Van Dort*, 502 P.2d 453 (Alaska 1972), and AS 15.05.010(4) means durational residency for 30 days. In *Van Dort*, we found 30-day residency necessary to further the compelling state interests in preventing fraud and administering elections, and hence a constitutionally valid indicium of bona fide residence. The state does not construe this clause to require a worker either to register or to vote.[20] As in *Van Dort*, in order to determine bona fide residency *vel non*, this 30-day requirement is permissible.

The fourth criterion is that the worker may not claim residency anywhere else during the durational period. Since we have stricken the durational period, we interpret this to mean no claim of residency anywhere else at the time of application or thereafter. Since it is part of the concept of domicile (which is what bona fide residency means for these purposes) [21] that a person may have only

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[20] The state official in charge of Alaska Hire testified, "we don't really consider voting too strongly . . . . [W]e don't give that criteria [sic] too much weight."

[21] *See* Vlandis v. Kline, *supra*, 412 U.S. at 454, 37 L.Ed.2d at 72-73, and State v. Adams, *supra*, 522 P.2d at 1131-32, durational residency requirement cases using the terms "domicile" and "residence" interchangeably. *See also* Restatement (Second) of Conflict of Laws § 11, comment k (1971).

The fact that the state offers as a justification for Alaska Hire a desire to give these jobs to persons with relatively strong ties to the state, suggests that one of the lower standards of "residency" was not intended in place of the more stringent domicile standard.

AS 36.10.010 provides for an employment preference for state residents in the performance of construction contracts let by the state or a political subdivision of the state. A resident for purposes of AS 36-10, is defined at AS 36.95.010(5) as follows:

> "(5) 'resident' means a person who maintains his domicile in the state: domicile is the true and permanent home of a person

one domicile at a time,[22] this is a reasonable requirement for determining bona fide residency.

Likewise, the fifth criterion, that the surrounding circumstances show an intent to make Alaska one's permanent home, is part of the definition of domicile, the intent to remain and not to go elsewhere.[23] "Permanent" does not require a promise to stay here forever. This indicium is no more subjective or vague than the concept of domicile itself.

The application form for a residency card asks for the following information covering the period of *two* years prior to application: all addresses where the applicant has lived; occasions on which the applicant has been physically outside Alaska, with reasons therefor; voting outside Alaska; claiming residency elsewhere "for any reason"; and all jobs held. Appellants conclude from this that the state department of labor has created a de facto two-year durational residency requirement. The only relevant testimony, that of David Finrow, is to the contrary. He said that evidence of attachment to another jurisdiction within the past two years is not grounds for automatic denial of a card, but that "a person's past practices sometimes indicate what his intentions are with regard to permanent Alaska residence." It goes to the second, fourth, and fifth criteria, not the first. This is in accord with the legal principle that evidence of domicile at an earlier time is evi-

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> from which he has no present intention of removing and to which he intends to return whenever he is away."

Ramey v. Rockefeller, 348 F. Supp. 780, 788-89 (E.D.N.Y. 1972) (3-judge court) (Friendly, J.), held that, at least for election purposes, a state may not define residence or domicile more strictly than the Second Restatement definition of domicile, and interpreted the requirement of "residence" in a state statute to be the same as the Second Restatement definition.

[22] Restatement (Second) of Conflict of Laws § 11(2) (1971).

[23] *Id.* § 18.

dence of domicile at a later time. 9 J. Wigmore, *Evidence* § 2530 (3d ed. 1940); C. McCormick, *Evidence* § 294 at 695-96 (2d ed. 1972) (statements of intent as to domicile are evidence of domicile at a later time also).

Having concluded that the state may constitutionally give a preference to residents, we find nothing in any of these remaining criteria, or in the state's administration of them, that acts as an impermissible standard for determining residence. The state is constitutionally entitled to use reasonable administrative means to determine who is a bona fide resident and who is not. Domicile or bona fide residence contains an objective requirement of physical presence and a subjective intent requirement. It is not unreasonable to use the objective indicia listed in AS 38.40.090 (1), other than the one-year requirement, to aid in determining whether an applicant has the subjective intent which is a necessary element of bona fide residence.

We note in particular that to be classified as a resident of Alaska, a person may not claim residence elsewhere. A person receiving any benefit from any other state on the basis of his residence in that state—e.g. voting, unemployment compensation, public assistance, "resident" tuition rate for unemancipated children, etc.—would not qualify. Likewise, once a person becomes an Alaska resident for this purpose, he becomes an Alaska resident for all purposes. For example, he must pay all taxes imposed upon residents by this state and the political subdivision in which he resides. He must register any motor vehicles in his possesion with the Alaska department of motor vehicles. Failure to do so would be evidence that the person is not in fact a resident and not entitled to the preference.

Just as a person may register to vote less than 30 days after beginning to reside in Alaska, but may not vote until after 30 days have elapsed, so a person may apply for a residency card within the initial 30 days, but may not receive any preference in hiring during that 30-day period.

As under the election laws, the 30-day period both serves administrative convenience and acts as an indicator of bona fide residence and intent to remain in Alaska.

V

In summary, we affirm the trial court's denial of relief, except with respect to AS 38.40.090(1)(A), imposing a one-year durational residency requirement, which we hold invalid as violating the equal protection clauses of the state and federal constitutions.

AFFIRMED IN PART AND REVERSED IN PART.

BOOCHEVER, *Chief Justice*, with whom RABINOWITZ, *Justice*, *joins, dissenting in part.*

AS 38.40.030 requires that all Alaskan oil and gas leases, easements or right-of-way permits for oil and gas pipelines and unitization agreements contain provisions requiring employment of Alaska residents. Only if qualified Alaska residents are unavailable, may others be employed. The provisions of the act apply also to all employment which is the result of oil and gas leases, easements, leases or right-of-way permits for oil or gas pipeline purposes and unitization agreements.[1] Thus, the act appears to include employment opportunities at refineries and in distribution systems utilizing oil and gas obtained under Alaska leases.

The majority opinion is based on an antiquated line of authority stemming from *Corfield* v. *Corfield*, 6 F. Cas. 546, 551-52 (No. 3,230) (C.C.E.D. Pa. 1823), where a local state fishery was held to be the common property of the people of the state. *Accord, Geer* v. *Connecticut*, 161 U.S. 519, 40 L. Ed. 793 (1896) (game birds); *McCready* v. *Virginia*, 94

[1] AS 38.40.050.

U.S. 391, 24 L. Ed. 248 (1876) (fish). Each of the cases cited by the majority deals with fish or game. *Corfield* limited commercial fishing for shellfish to local fishermen; *Geer* pertained to game birds and *McCready* restricted the planting of oysters in Virginia waters to Virginians.

The application of these cases has been severely limited by *Toomer* v. *Witsell*, 334 U.S. 385, 92 L. Ed. 1460 (1948). There, the Court pointed out that *McCready* was its only prior decision upholding discrimination against commercial fishing or hunting by citizens of other states without advancing "persuasive independent reasons justifying the discrimination." The court refused to extend *McCready* beyond its facts and struck down a law whereby shrimp boats belonging to South Carolina residents were licensed for substantially lower fees than those of nonresidents.

McCready was distinguished on two grounds. First, the Court pointed out that, in contrast to the Virginia oysters, the South Carolina shrimp were free-swimming and migrating. Secondly, it emphasized that *McCready* involved regulation of inland waters while *Toomer* involved the marginal sea. Thus, casting serious doubt on the continued authority of *McCready*, it concluded:

> These considerations lead us to the conclusion that the McCready exception to the privilege and immunity clause, *if such it be*, should not be expanded to cover this case. (emphasis added)[3]

A rationale for state action more in keeping with the mobility of modern society was advanced:

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary

[3] 334 U.S. at 402, 92 L. Ed. at 1474.

> conflict between that vital policy consideration and the constitutional command that the State exercise that power. like its other powers, so as not to discriminate without reason against citizens of other States. (footnote omitted)[4]

The majority bases its holding on the theory that the natural resources of Alaska "belong" to Alaska and Alaskans. Under this rationale, it has been held thot certain state resources may be restricted for state use.[5] But the law here in question is not aimed at restricting oil and gas use to Alaska.[6] In fact, the Alaska Pipeline has been constructed to the port of Valdez as a means of delivery of the oil to other states.

Even assuming *McCready* has continued viability,[7] however, ready distinctions here, as in *Toomer*, render that

[4] *Id.*

[5] In People v. Crane, 108 N.E. 427, 430 (N.Y. 1915), then Judge Cardozo stated: "The state in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens." The *Crane* decision was affirmed in Crane v. New York, 239 U.S. 195, 60 L. Ed. 218 (1915), which held that a state may give preference to its residents when using its funds on public works projects. *Accord*, Heim v. McCall, 239 U.S. 175, 60 L. Ed. 206 (1915); People *ex rel.* Holland v. Bleigh Constr. Co., 335 N.E.2d 469 (Ill. 1975). *Crane* and *Heim* were held no longer to be controlling as applied to preference in state employment of United States citizens over aliens. Sugarman v. Dougall, 413 U.S. 634, 645, 37 L. Ed. 2d 853, 861 (1973). *See also* C.D.R. v. Board of Education, 412 F. Supp. 1164 (E.D. N.Y. 1976), *affirmed*, —— U.S. ——, —— L. Ed. —— (1977).

[6] If the use of the resource were restricted to the state, serious constitutional questions would be involved. In Pennsylvania v. West Virginia, 262 U.S. 581, 67 L. Ed. 1117 (1923), it was held that an attempt by West Virginia to require preference in use of natural gas produced in that state to local consumers had the effect of withdrawing large quantities of gas from interstate markets and was an unconstitutional interference with interstate commerce.

[7] *See* Justice Braucher's cogent opinion in Commonwealth v. Wescott, 344 N.E.2d 411 (Mass. 1976).

case inapplicable. We are not dealing with any proprietary interest of a state in its fish and game. Nor is the statute with which we are concerned limited to the extraction of oil located on state lands. The Alaska act goes much further and restricts nonresident employment not only in extraction of a natural resource, but also in the distribution or any other use resulting from its extraction.[7] In fact, employment on the pipeline involves construction of a distribution system rather than extraction of the oil. Moreover, the rationale behind the statute could be applied to all leases of state lands. Under the Alaska Statehood Act, Alaska was authorized to select in excess of 103,000,000 acres of land.[8] As a condition to utilizing the natural resources, whether by mining, agriculture or timber industry, provisions in the leases could require preferential hire of residents. Such provisions could specify a local preference in all employment resulting from the leases. Thus, nonresidents could be barred from dairy, agricultural, mining and lumber industries established on state lands, as well as from employment in any processing or manufacturing resulting therefrom. There is nothing in *McCready* to suggest that such a pervasive restriction of nonresident employment would be constitutionally permissible.

Certainly, Alaska has a major problem with unemployment. This problem is particularly acute in rural arctic communities which are faced with the inexorable change from their historic reliance on fish and game for subsistence. Hopefully, by means of valid enlightened legislation such as the Alaska Native Claims Settlement Act[9] and the initiative of community leaders, these concerns may properly be addressed.

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[7] AS 38.40.050.

[8] Alaska Statehood Act, P. L. 85-508, 72 Stat. 339 (July 7, 1958) Sec. 6.

[9] P. L. 92-203, 85 Stat. 688, 43 U.S.C. 1601 *et seq.* (Dec. 18, 1971).

In any event, preference for resident employees may not be upheld on the basis of the economic benefits derived by the state. If economic benefits to residents could justify discrimination, the privileges and immunities clause of the United States Constitution would become meaningless. It was for that reason that we held in *Lynden Transport, Inc.* v. *State*, 532 P.2d 700, 711 (Alaska 1975):

> Benefiting economic interests of residents over nonresidents is not a purpose which may constitutionally vindicate discriminating legislation, ...

While Alaska's problem is unique in its specific setting, other states either presently or in the past have confronted similar economic problems.[10] It takes little imagination to see that if Alaska's local hire law is constitutional because of economic benefits to its residents, each state could justify restricting to its own residents not only the utilization of its lands and natural resources, but also employment resulting from such use.

In my opinion, the local hire statute runs afoul of the concept of federalism. In *The Federalist*, John Jay, Alexander Hamilton and James Madison wrote eloquently of

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[10] For example, New York state has encountered unemployment and substandard living conditions resulting from waves of migrants to New York City. The vast automobile industry of Michigan is subject to periodic upheavals causing massive unemployment. The exodus of industry from the New England states presents them with equally valid economic reasons for favoring residential employment. California at one time sought to keep out nonresident indigents. In Edwards v. California, 314 U.S. 160, 86 L. Ed. 119 (1941), a law making it a criminal offense to bring or assist in bringing an indigent nonresident into California was held invalid by a unanimous Court. Five justices based their decision on the Commerce Clause. Justice Douglas, speaking for three members of the Court, based his decision on the right of persons to move freely from state to state. He held that the law violated the fourteenth amendment privileges and immunities clause protecting privileges and immunities of national citizenship against state interference. Justice Jackson took a similar approach.

the importance of our being one nation with citizens enjoying the same rights, privileges and protection.[11] These principles were echoed by Justice Cardozo in *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523, 79 L. Ed. 1032, 1038 (1935).[12]

In *Toomer*, Chief Justice Vinson spoke of the privileges and immunities clause in terms of a like philosophy:

> The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of

[11] *The Federalist*, No. 2 (J. Jay) p. 94 (Wright, ed. 1972):

> To all general purposes we have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges, and protection.

The Federalist, No. 22 (A. Hamilton) p. 192 (Wright, ed. 1972):

> 'The commerce of the German empire is in continual trammels from the multiplicity of the duties which the several princes and states exact upon the merchandises passing through their territories, by means of which the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless.' Though the genius of the people of this country might never permit this description to be strictly applicable to us, yet we may reasonably expect, from the gradual conflicts of State regulations, that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens.

See also The Federalist, No. 42 (J. Madison) (Wright, ed. 1972).

[12] Rejecting the contention that New York could apply its laws for the purposes of economic protection of its dairy industry against out-of-state milk producers, he stated:

> To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the people of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

> State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation. Indeed, without some provisions of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the public would have constituted little more than a league of States; it would not have constituted the Union which now exists. Paul v. Virginia, 8 Wall (US) 168, 180, 19 L ed 357, 360 (1868).
>
> In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State. 334 U.S. at 395-96, 92 L. Ed. 2d at 1471.

If local hire is valid and each state may restrict to its own residents not only the utilization of its land and natural resources but also employment resulting from such use, then the concept of federalism would be effectively extinguished. Each state would become a separate and isolated enclave. I cannot believe that the Framers intended such a result and therefore conclude that the local hire statute is unconstitutional.[13]

[13] In Douglas v. Seacoast Products, Inc., 45 U.S.L.W. 4488 (May 23, 1977), the United State Supreme Court has reiterated the concept of federalism in stricking down, primarily on the basis of federal pre-emption and the Supremacy Clause, a Virginia law prohibiting federally licensed vessels owned by nonresidents of Virginia from fishing in Chesapeake Bay. In condemning such restrictive laws, the Court stated:

> Each State's fishermen eventually might be effectively limited to working in the territorial waters of their residence, or in the federally controlled fishery beyond the three-mile limit. Such proliferation of residency requirements for commercial fishermen would create precisely the sort of Balkanization of interstate commercial activity which the Constitution was intended to prevent. 45 U.S.L.W. at 4493. (footnotes omitted, citations omitted)

THE SUPREME COURT OF THE STATE OF ALASKA

File No. 3025

Mandate

(CAPTION OMITTED IN PRINTING)

To: Superior Court of the State of Alaska,
Third Judicial District at Anchorage.

Sidney S. Hicklin, et al. filed an appeal from an order of the Superior Court, Third Judicial District at Anchorage in Civil Action No. 76-3300 entitled, "SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHEBS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN, Plaintiffs vs. EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska, Defendants". The case was heard on October 14, 1976. On June 3, 1977 the court filed its written opinion.

IT IS ORDERED:

The order of the Superior Court, entered on July 21, 1976, is affirmed in part and reversed in part.

WITNESS the Honorable Robert Boochever, Chief Justice of the Supreme Court, State of Alaska, this 13th day of June, 1977.

CLERK OF SUPREME COURT
/s/ Donna Spragg Pegues
DONNA SPRAGG PEGUES

[SEAL]

APPENDIX II

STATE OF ALASKA

[SEAL]

Title 38. Public Lands

ALASKA LAND ACT AS 38.10.180 S

LOCAL HIRE UNDER STATE LEASES
AS 38.40.010 TO 38.40.090

JAY S. HAMMOND
Governor

EDMUND N. ORBECK
Commissioner

ALASKA STATUTES

TITLE 38, PUBLIC LANDS

CHAPTER 05. ALASKA LAND ACT

Sec. 38.05.180. Oil and gas. (a)

(s) Each oil or gas lease issued by the state shall contain a provision requiring the lessee to furnish the Department of Labor a quarterly report regarding the employment on the leased property of state residents. The commissioner of labor shall promulgate regulations necesary to carry out the provisions of this subsection.

(am § 1 ch 65 SLA 1969; am § 1 ch 86 SLA 1970)

CHAPTER 40, LOCAL HIRE UNDER STATE LEASES

SECTION

10. State policy
20. Legislative findings
30. Resident hire
40. Reporting provisions
50. Applicability of chapter
60. Regulations and hearings
70. Penalties
80. Injunctive relief
90. Definitions

Editor's note.—
Section 2, ch.191, SLA 1972 provides: "If a court of competent jurisdiction invalidates any of the criteria or tests of residency in sec. 90 of this chapter, the term 'resident' then means a person who satisfies the remaining criteria or tests not invalidated, and this chapter shall be administered and enforced accordingly."

Sec. 38.40.010. State policy. It is the policy of the state in the development of its natural resources to seek and accomplish the development of its human resources by providing maximum employment opportunities for its residents in conjunction with natural resource management. (§ 1 ch 191 SLA 1972)

Sec. 38.40.020. Legislative findings. The legislature finds that Alaska has a uniquely high unemployment record among the states due both to cultural and geographical migration barriers which record has existed for many years and which experts have attested will persist without drastic governmental intervention. The legislature further finds that employment opportunities which from time to time occur in the areas of the state suffering from the largest chronic unemployment problem are nonrecurring and usually relate to the exploitation of the state's natural resources and that the state has an obligation to assure that the benefits of this employment enure to the residents of the state. (§ 1 ch 191 SLA 1972)

Sec. 38.40.030. Resident Hire. (a) In order to create, protect and preserve the right of Alaska residents to employment, the commissioner of natural resources shall incorporate into all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes, unitization agreements or any renegotiations of any of the preceding to which the state is a party provisions requiring the lessee to comply with applicable laws and regulations with regard to hire of Alaska residents. The commissioner shall include a provision requiring the hiring of qualified Alaska residents, a provision prohibiting discrimination against Alaska residents and, when in the determination of the commissioner it is practicable, a provision requiring compliance with the Alaska Plan, all in accordance with the provisions of this chapter.

(b) In implementing this chapter the commissioner of labor shall determine the amount of work which must be performed by qualified Alaska residents under this chapter. In making this determination the commissioner shall consider the nature of the work, the classification of workers, availability of residents, the willingness of residents to perform the work and shall require the maximum feasible effort by employers to fill available jobs with qualified Alaskans.

(c) In implementing this chapter the commissioner of labor may require compliance with the terms and conditions of the Alaska Plan as approved by the United States Secretary of Labor to the extent feasible.

(d) In implementing this chapter the commissioner of labor shall adopt regulations prohibiting discrimination against Alaska residents in hiring practices. (§ 1 ch 191 SLA 1972)

Sec. 38.40.040. Reporting provisions. (a) Persons obligated to meet resident hiring requirements under this chapter shall comply with those reporting provisions which

the commissioner of labor determines are reasonably necessary to carry out the purposes and intent of this chapter.

(b) The Department of Labor shall maintain a file consisting of the names of qualified Alaska residents seeking the type of employment covered by this chapter and resident Alaskans enrolled in approved on-the-job training programs who are qualified to perform the work required under this chapter. (§ 1 ch 191 SLA 1972)

Sec. 38.40.050. Applicability of chapter. (a) The provisions of this chapter apply to all employment which is a result of oil and gas leases, easements, leases or right-of-way permits for oil or gas pipeline purposes, unitization agreements or any renegotiation of any of the preceding to which the state is a party after July 7, 1972; however, the activity which generates the employment must take place inside the state and it must take place either on the property under the control of the person subject to this chapter or be directly related to activity taking place on the property under his control and the activity must be performed directly for the person subject to this chapter or his contractor or a subcontractor of his contractor or a supplier of his contractor or subcontractor.

(b) The Department of Labor shall determine a dollar amount value of each project or activity covered by this chapter and set a minimum dollar figure below which this chapter does not apply. In arriving at this minimum dollar figure the department shall consider the benefit which enures to Alaska residents versus administrative and enforcement costs. The department, by appropriate investigation and ruling, shall insure that projects or activities within projects are not artificially divided to prevent coverage under this chapter. The burden is on the person covered by this chapter to show that artificial division has not occurred or is not occurring. (§ 1 ch 191 SLA 1972)

Sec. 38.40.060. Regulations and hearings. (a) The Departments of Labor and Natural Resources shall promulgate appropriate regulations to implement the provisions of this chapter. Regulations promulgated and hearings conducted under this chapter are subject to the Administrative Procedure Act (AS 44.62) except as provided in (b) of this section.

(b) It is the employer's responsibility to determine and adjudge the work qualifications of the prospective employee. A person who is qualified and has been rejected may request a hearing before the Department of Labor to determine if the potential employer is in compliance with the provisions of this chapter. The department shall set a date for and hold a hearing on the question within 10 days of receipt of the request unless the person applying requests a longer period of time. (§ 1 ch 191 SLA 1972)

Sec. 38.40.070. Penalties. (a) The Department of Natural Resources, upon certification of noncompliance of a person by the Department of Labor, after appropriate investigations and hearings, may, subject to judicial review, impose any of the following appropriate penalties:

(1) increase in rental or other forms of compensation received by the state by a factor of no more than 10 but in no event to exceed $100,000;

(2) require the halting of all or any portion of project operations;

(3) stop payments on any or all existing contracts with the state;

(4) remove, for an appropriate period of time the ability of the person to contract with the state or any of its political subdivisions; or

(5) require a noncompliance payment in liquidated damages to the state in an amount equal to seven and one-half times the number of hours required, but not worked by

Alaska residents, times the going wage or salary rate for the particular job or activity involved.

(b) Notwithstanding the provisions of (a) of this section, no penalty may be imposed against a lessee because of noncompliance with the provisions of this chapter by a supplier of the lessee's contractor or subcontractor if the lessee has received and retained a certificate from the supplier certifying that the supplier is in compliance with the provisions of this chapter. No certificate from the supplier is a bar to the imposition of a penalty against a lessee unless the certificate was made (1) upon oath or affirmation, (2) on forms prepared by the commissioner of labor furnished to the lessee before the date of the supplier's noncompliance, and the lessee has furnished a copy of the certificate to the commissioner of labor together with such additional information as the commissioner may require, and (3) by a supplier who is not himself a contractor or subcontractor of the lessee.

(c) The commissioner of labor, by regulation adopted under this chapter, may designate the intervals within which certificates of suppliers must be furnished under this section in order to constitute a bar against the imposition of penalties. (§ 1 ch 191 SLA 1972)

Sec. 38.40.080. Injunctive relief. The Department of Labor or the Department of Natural Resources, in addition to the imposition of any penalties under § 70 of this chapter, may seek injunctive relief against a person not in compliance with the provisions of this chapter; the Department of Natural Resources may seek injunctive relief to enforce penalties imposed under § 70 of this chapter. (§ 1 ch 191 SLA 1972)

Sec. 38.40.090. Definitions. In this chapter "resident" means a person who

(1) except for brief intervals or military service has been physically present in the state for a period of one

year immediately prior to the time he enters into a contract of employment; and

(2) maintains a place of residence within the state; and

(3) has established a residency for voting purposes within the state; and

(4) has not, within the period of required residency, claimed residency in another state; and

(5) shows by all attending circumstances that his intent is to make Alaska his permanent residence.
(§ 1 ch 191 SLA 1972)

Editor's note.—Section 2, ch. 191, SLA 1972, provides: "If a court of competent jurisdiction invalidates any of the criteria or tests of residency in sec. 90 of this chapter, the term 'resident' then means a person who satisfies the remaining criteria or tests not invalidated, and this chapter shall be administered and enforced accordingly."

APPENDIX III

Chapter 35. Oil and Gas Leases, Local Hire

Section

10. Employer requirements
11. Reduction of work force
13. Determination of resident status
14. Application
15. Action on applications
16. Appeals from adverse decisions
17. Review by commissioner
20. Private recruitment permitted
25. Notification of project
30. (Repealed)
40. Audits
42. Discrimination against Alaska residents
44. Complaints
46. Investigations, preliminary conference, reconciliation
50. Hearing
55. (Repealed)
60. Employers excluded
70. Quarterly reports
80. Suppliers
90. Definitions

8 AAC 35.010. EMPLOYER REQUIREMENTS. (a) Repealed. (Eff. 8/20/76, Reg. 59)

(b) An employer shall designate by written notice to the director a representative (individually or severally) to work with duly authorized representatives of the department to see that the purposes of this chapter are carried out. (Eff. 6/21/73, Reg. 46; am 7/8/76, Reg. 58; am 8/20/76, Reg. 59)

Authority: AS 38.40.030(b) AS 38.40.050
AS 38.40.040(b) AS 38.40.060

8 AAC 35.011. REDUCTION OF WORK FORCE. (a) When either a resident employee or a nonresident employee, working in the same trade or craft, is to be laid off, the nonresident may be retained only if no resident employee is qualified to fill the position.

(b) This section does not require that a resident employee be transferred from employer to employer where a project has more than one employer, nor does it require that a resident employee be transferred from one geographic work unit, camp, or site to another.

(c) This section does not preclude an employer from laying off an entire work crew, irrespective of the resident status of its members, unless the composition of the employer's crew was made in a manner discriminatory to residents before the layoff. A crew, for purposes of this subsection, is a work unit no larger than the employer's smallest subdivision under the supervision of a foreman or that size unit which is traditional or commonly used in the affected industry or project. (Eff. 7/8/76, Reg. 58; am 8/20/76, Reg. 59)

Authority: AS 23.05.060(5) AS 38.40.030(d)
AS 23.05.130 AS 38.40.060

8 AAC 35.013. DETERMINATION OF RESIDENT STATUS. (a) An initial determination of the residence of an individual will be made by the wage and hour division. A person who has been determined not to be a resident may resubmit an application for resident status if there are new or previously undisclosed circumstances bearing upon that resident status. A subsequent application must note on its face that it is not an initial application and must set forth specifically the new facts or changed circumstances felt by the applicant to establish his Alaska residence.

(b) The wage and hour division will maintain a file of those persons certified as Alaska residents.

(c) The employment security division will ascertain the occupational classification of a resident based upon work experience, training, and education. The information on an individual's willingness to relocate and his resident status will be maintained in the department's job applicant retrieval system. (Eff. 3/18/75, Reg. 54; am 7/8/76, Reg. 58)

Authority: AS 23.05.060(5) AS 38.40.040(b)
AS 23.05.130 AS 38.40.060
AS 38.40.030(d)

8 AAC 35.014. APPLICATION. (a) An application for determination of resident status must be made on a form provided by the department. The form is available from the wage and hour division of the Department of Labor, P.O. Box 630, Juneau, Alaska, 99811, or any office of the employment security division.

(b) The application form must be signed by the applicant and certified by a person authorized to do so by AS 09.65.010 or, in the absence of an official empowered to administer oaths, pursuant to AS 09.65.012(a).

(c) An applicant must mail his or her application for resident status to the director, wage and hour division, Department of Labor, P.O. Box 630, Juneau, Alaska, 99811, or deliver a completed application to any employment security office of the department.

(d) An incomplete application will be returned to the applicant without a determination. (Eff. 3/18/75, Reg. 54; am 7/8/76, Reg. 58)

Authority: AS 23.05.060(5) AS 38.40.030(d)
AS 23.05.130 AS 38.40.060

8 AAC 35.015. ACTIONS ON APPLICATIONS. (a) A determination of the resident status of an applicant will be made by the wage and hour division as soon as possible after receipt of the completed application by the wage and

hour division. In making its determination, the division is not restricted to information provided on the application form; however, additional information considered will be attached, or noted, and made part of the record. The burden of proving Alaska residency by clear and convincing evidence is on the applicant.

(b) Upon determination that the applicant is a resident, the department will issue a certificate of residence to the applicant. The employer may rely on the certificate of residence as proof of a person's resident status for purposes of the Act.

(c) A certificate of residence expires two years after its date of issue, or upon the failure of a person holding the certificate to continue to satisfy any of the provisions of AS 38.40.090 which define the criteria for residence.

(d) Upon expiration of a certificate of residence, a person may obtain a new certificate by following the procedures in sec. 13 of this chapter. (Eff. 3/18/75, Reg. 54; am 7/8/76, Reg. 58)

Authority: AS 23.05.060(5) AS 38.40.060
AS 23.05.130 AS 38.40.090
AS 38.40.030(d)

8 AAC 35.016. APPEALS FROM ADVERSE DECISIONS. (a) A determination that an applicant is not an Alaska resident is final unless the adversely affected applicant, or his authorized representative, files a written petition with the director of the wage and hour division, P.O. Box 630, Juneau, Alaska, 99811, appealing the determination. This section does not prohibit the resubmission of an application where there are new facts or circumstances bearing upon the applicant's resident status.

(b) The petition must identify the matter appealed, and give a statement of reasons for the appeal, and any arguments the appellant wishes to make in support of his or

her appeal. A particular form for the petition is not required.

(c) The petition must be received in the office of the director within 20 days after the receipt by the petitioner of the determination being appealed. If the initial decision was mailed to the applicant, the petition must be received within 20 days after the date of the mailing of the determination.

(d) An interested person, including an Alaska resident, who has information or knowledge relevant to an appeal, may submit any evidence, reasons or arguments bearing upon the matter to the director within 10 days of the filing of the petition. This evidence, reasons or arguments will be provided by the director to the petitioner, and the petitioner has 10 days from its receipt to respond in writing.

(e) The director may, at his discretion, grant to the petitioner or a respondent an opportunity for oral argument.

(f) The petitioner has the burden of proving his or her resident status. If proceedings are held in connection with an appeal, they will be conducted as informally and expeditiously as is consistent with good practice.

(g) The petitioner and an interested party who submits evidence, reasons or arguments in connection with any appeal shall, at the time of the initial filing or submission, state his mailing address on the filing or submission. Thereafter, he must promptly inform the director of any change in address, identifying specifically the matter under consideration by the director. A person failing to furnish a mailing address is not entitled to notice in connection with the appeal. Notice in connection with an appeal is adequate if mailed to the last address on record.

(h) A petitioner and an interested party may offer any relevant evidence as they consider appropriate. The director may admit letters, or copies of letters, or other evidence

not ordinarily admissible under the generally accepted rules of evidence. The weight to be attached to evidence presented in any particular form shall be determined by the director, taking into consideration all the circumstances of the particular case. The director will in his discretion require evidence in addition to that offered by the parties in interest.

(i) In computing a period of time prescribed in this chapter for the filing of documents, the day upon which the decision or document to be appealed from or answered was served, or the day of any other event upon which the designated period of time begins to run, is not to be included. The last day of the period computed is to be included unless it is a Saturday, Sunday or holiday. The director may grant an extension of time to a party for good cause shown.

(j) The director will make a written decision on the appeal, includings findings of fact and conclusions of law, and serve the decision on all parties to the appeal. (Eff. 3/18/75, Reg. 54; am 7/8/76, Reg. 58)

Authority: AS 23.05.050 AS 38.40.030(d)
AS 23.05.060(5) AS 38.40.060
AS 23.05.130

8 AAC 35.017. REVIEW BY COMMISSIONER. (a) If the director upholds the initial determination and denies the appeal, the appellant may petition the commissioner for a review of the director's decision within 10 days of his receipt of the denied appeal. No particular form for the petition is prescribed except that it must identify the matter sought to be reviewed and it must be served upon both the director and the commissioner.

(b) Within five days of receipt of this petition for review the director shall forward the decision and the entire administrative record, including his findings of fact and conclusions of law, to the commissioner.

(c) Within 30 days of receipt of a petition for review, the commissioner will make a decision on the matter which will be final. (Eff. 3/18/75, Reg. 54; am 7/8/76, Reg. 58)

Authority: AS 23.05.060(5) AS 38.40.030(d)
AS 23.05.130 AS 38.40.060

8 AAC 35.020. PRIVATE RECRUITMENT PERMITTED. (a) This chapter does not prohibit an employer from employing qualified Alaska residents through nongovernment sources. However, if an employer is unable to obtain qualified Alaska residents through nongovernment sources, the employer shall, prior to the employment of any nonresidents, list his employee requirements with an employment office of the department, identifying himself as covered by this chapter. The employer shall allow the department two days, excluding Saturday, Sunday and state holidays, to produce qualified resident workers prior to the employment of nonresidents. If suitable resident workers are not provided within the specified time period, the employer may employ a person possessing the qualifications necessary to perform the work.

(b) An employer may hire nonresidents as casual or intermittent employees if their employment will not exceed five working days.

(c) An employer may hire nonresidents in an emergency. Employment of the nonresidents must be terminated when the emergency ends. (Eff. 6/21/73, Reg. 46; am 7/8/76, Reg. 58)

Authority: AS 23.05.060(5) AS 38.40.030
AS 23.05.130 AS 38.40.060

8 AAC 35.025. NOTIFICATION OF PROJECT. (a) A person planning to employ individuals on a project shall notify the wage and hour division, P.O. Box 630, Juneau, Alaska, 99811, of the project not less than 15 days before the commencement of any activity. The notification must include a description of the project and an estimate of the required work force by job classification.

(b) Upon the request of the division, the employer shall furnish one copy of any collective bargaining or other agreements relating to the employment of persons on the project. (Eff. 7/8/76, Reg. 58)

Authority: AS 23.05.060(5)
AS 38.40.040
AS 38.40.060

8 AAC 35.030. EMPLOYEE FILE. Repealed. (Eff. 7/8/76, Reg. 58)

8 ACC 35.040 AUDITS. All employers shall permit access during normal business hours to books, records, and accounts pertinent to compliance with these regulations for purposes of investigation by the department to ascertain compliance with these regulations. (Eff. 6/21/73, Reg. 46)

Authority: 38.40.030
AS 38.40.060

8 AAC 35.042. DISCRIMINATION AGAINST ALASKA RESIDENTS. The following discriminatory practices by an employer subject to the Act against Alaska residents who are employed or seeking employment on a project are prohibited:

(1) hiring nonresidents when residents are known to be available, willing and qualified for employment;

(2) rejection of a resident referred to an employer by a collective bargaining agent in favor of a nonresident of similar qualifications in employment covered by a collective bargaining agreement;

(3) rejection of a resident in favor of a nonresident of similar qualifications in employment not covered by a collective bargaining agreement;

(4) termination of a resident in favor of a nonresident of similar qualifications; and

(5) differentiation in payment of wages, salaries, fringe benefits, and working conditions between a resident and nonresident. (Eff. 7/8/76, Reg. 58)

Authority: AS 23.05.060 AS 38.40.030
AS 23.05.130 AS 38.40.060

8 AAC 35.044. COMPLAINTS. (a) An Alaska resident who believes he has been discriminated against in violation of AS 38.40 and sec. 42 of this chapter may, on his own initiative or through an attorney, make, sign, and file with the wage and hour division a verified complaint in writing. Assistance in drafting and filing complaints will be available at all offices of the wage and hour division.

(b) The complaint must be on a form provided by the division, the original being signed and verified before a notary public or other person authorized by law to administer oaths and take acknowledgements. When available, notarial service for this purpose will be provided without charge by the department.

(c) A complaint must contain

(1) the full name and address of the person making the complaint (referred to as the "complainant");

(2) the full name and address of the employer against whom the complaint is made (referred to as the "respondent");

(3) a statement of the facts of the alleged discriminatory act;

(4) the date or dates of the alleged act;

(5) a statement of any other action, civil or criminal, instituted in any other forum based on the same grievance

as alleged in the complaint, together with a statement of the status or disposition of the other action.

(d) Complaints must be filed with the wage and hour division at any of its offices, or by mail. Written complaints which are incomplete in form but contain substantially all of the information required in a complaint will be considered filed upon receipt.

(e) A complaint or a request for a complaint form must be made within 15 days of the date of the alleged discrimination or of the date that the complainant became aware of the facts which lead him to believe he was discriminated against.

(f) A copy of all amendments to the complaint made subsequent to service of the notice of hearing, as provided in sec. 50 of this chapter, will be served by the wage and hour division on both the complainant and the respondent, except amendments to the complaint that are entered in the record during the course of the hearing.

(g) The wage and hour division or the complainant may reasonably and fairly amend the complaint, as a matter of right, before the commencement of a hearing.

(h) A complaint, or any part of it, may be withdrawn by the complainant.

(i) If the wage and hour division determines, either on the face of the complaint or after investigation, that the complaint should be dismissed, it will dismiss the complaint and notify the parties by certified mail, return receipt requested, of its determination.

(j) A complainant whose complaint has been dismissed under (i) of this section or following a preliminary conference under sec. 46(f) of this chapter has 15 days from receipt of the notice of dismissal to request a review of the dismissal of the complaint from the commissioner, who will render a decision within 30 days of such a request.

(k) Repealed. (Eff. 8/20/76, Reg. 59) (Eff. 7/8/76, Reg. 58; am 8/20/76, Reg. 59)

Authority: AS 23.05.060(5) AS 38.40.030
AS 23.05.130 AS 38.40.060

8 AAC 35.046. INVESTIGATIONS, PRELIMINARY CONFERENCE, RECONCILIATION. (a) Upon receipt of a complaint of discrimination from a resident, the wage and hour division will set a date for a preliminary conference with the parties to be held within 10 days of the receipt of the complaint by the respondent employer, unless a later date is requested by the complainant.

(b) The preliminary conference will be held at a place designated by the wage and hour division, with consideration for the convenience of the parties and witnesses.

(c) The preliminary conference will include a representative of the wage and hour division, the complainant and counsel, if desired, and the respondent and counsel, if desired.

(d) At a preliminary conference the complainant and respondent and their counsel shall discuss the terms of the complaint and an effort to reconcile the differences between the parties will be made by the wage and hour division.

(e) If no reconciliation can be accomplished by a preliminary conference and the circumstances warrant further action, the wage and hour division will set a date for a full hearing on the matter prior to concluding the preliminary conference. The hearing will be held at the convenience of the complainant and respondent, but no later than 30 days following the preliminary conference.

(f) If the wage and hour division determines that no further investigation of the complaint is required following a preliminary conference, a notice of its decision dismissing the complaint shall be given in writing within 15 days

to the complainant and respondent. The notice must state the reasons for that decision and the specifics of any reconciliation arrived at during the preliminary conference. (Eff. 7/8/76, Reg. 58)

Authority: AS 23.05.060(2)
AS 23.05.090
AS 38.40.060

8 AAC 35.050. HEARING. (a) In all cases where a hearing on a complaint of discrimination filed under sec. 44 of this chapter is scheduled, the wage and hour division will determine the time and place of the hearing and deliver or mail a notice of hearing to the complainant, respondent, and any interested party at least 20 days before the hearing. The notice may be waived with the mutual consent of the complainant and respondent.

(b) Notice of the hearing will include the complainant's statement of facts regarding the complaint and specify the regulations and statutes the respondent is alleged to have violated.

(c) The complainant, respondent or an interested party may present relevant evidence at the hearing, including testimony, affidavits and documents relevant to the discrimination complaint for which the hearing is being held. Depositions, affidavits and documents that have been stipulated to by the complainant or respondent prior to the hearing will also be entered into the record.

(d) Oral evidence will be taken only upon oath or affirmation.

(e) Common law rules of evidence will apply except when the hearing officer determines that their application is not required in order to assure fair treatment of the complainant or respondent and that the evidence offered is relevant and of the sort on which responsible persons are accustomed to rely in the conduct of serious matters.

(f) The complainant, respondent and the hearing officer may

(1) call and examine witnesses;

(2) introduce exhibits;

(3) cross-examine opposing witnesses on matters relevant to the issue even though the matter was not covered in the direct examination. If the complainant or respondent does not testify, he may be called and examined by the hearing officer.

(g) At the request of the complainant or respondent for good cause shown, or upon his own motion, the hearing officer shall issue a subpoena to compel the production of testimony or other evidence at a hearing.

(h) The hearing officer may require that the testimony of a material witness be taken by deposition.

(i) Documents or affidavits intended to be used at a hearing should be submitted to the wage and hour division prior to the hearing so that they may be stipulated to whenever possible.

(j) The hearing officer may order the continuance of a hearing for good cause shown.

(k) If a complainant or respondent does not appear at a hearing that has been set, the hearing officer, unless good cause is shown, will act upon the evidence presently at his disposal without notice to the absent complainant or respondent.

(l) The hearing officer shall prepare a written decision which shall be final. A copy will be mailed or otherwise delivered to the complainant and respondent.

(m) The hearing officer may consolidate hearings of a similar nature based on complaints against the same em-

ployer. (Eff. 6/21/73, Reg. 46; am 7/8/76, Reg. 58; am 8/20/76, Reg. 59)

Authority: AS 23.05.050 AS 23.05.130(5)
AS 23.05.060 AS 38.40.060(b)

8 AAC 35.055. COMMISSIONER'S DECISION. Repealed. (Eff. 8/20/76, Reg. 59)

8 AAC 35.060. EMPLOYERS EXCLUDED. (a) Employers excluded from coverage under the Act are those employers whose payroll does not exceed $10,000 per quarter.

(b) Those employers claiming exclusion under (a) of this section must submit a quarterly report showing the employer's estimated volume of payroll per quarter for its employees. (Eff. 6/21/73, Reg. 46; am 7/8/76, Reg. 58)

Authority: AS 23.05.060(5)
AS 38.40.050(b)
AS 38.40.060

8 AAC 35.070. QUARTERLY REPORTS. (a) An employer shall file with the wage and hour division, on or before the end of the month following the quarters ending March 31, June 30, September 30 and December 31 of each calendar year, two certified copies of a report concerning the previous quarter containing

(1) name and address of employer;

(2) total number of employees;

(3) a listing of employees by job site, including

(A) name of each employee of the employer;

(B) permanent residence address of each employee;

(C) social security number of each employee;

(D) place of hire;

(E) date of hire;

(F) date employee terminated (if applicable);

(G) job classification of each employee;

(H) either each employee's resident card number or the date of each employee's residence in Alaska as residence is defined by AS 38.40.090;

(4) the number of the lease.

(b) If a project has occurred in the preceding quarter, each lessee shall, in addition to the requirements of (a) of this section

(1) report all persons employed by his contractors, subcontractors and suppliers in activites resulting from the project; or

(2) submit a certificate from each contractor, subcontractor or supplier stating that they have filed a quarterly report with the wage and hour division as required in (a) of this section or sec. 60(b) of this chapter.

(c) If a lessee, or contractor, subcontractor or supplier employed by a lessee, utilizes an automated data processing system to maintain his employee records, a magnetic tape may be submitted in lieu of a printed report to satisfy the quarterly reporting provisions of this section. The magnetic tape must contain all the information required in (a) and (b) of this section and must be compatible with the automated data processing system used by the department. Upon receipt of the tape, the department will make a copy of the tape and return the original to the person supplying the quarterly report.

(d) If a magnetic tape is provided by the employer to satisfy these quarterly reporting requirements, a notarized statement attesting to the accuracy of the information con-

tained on the tape must accompany its submittal. (Eff. 6/21/73, Reg. 46; am 7/8/76, Reg. 58)

Authority: AS 23.05.060 AS 23.05.180
AS 23.05.080 AS 38.40.030
AS 23.05.090 AS 38.40.040
AS 23.05.100 AS 38.40.060

8 AAC 35.080. SUPPLIERS. (a) Suppliers shall have the same hiring requirements as an employer covered by this chapter, as to that portion of their supply business that is the result of a project or activity of a lessee, contractor or subcontractor.

(b) A supplier who provides delivery, installation or pre-operational testing of goods shall not be considered a contractor or subcontractor of the lessee or other person subject to AS 38.40. However, a supplier who provides services for any person or business subject to AS 38.40 shall be considered a contractor or subcontractor and shall be subject to all requirements of AS 38.40 pertaining to contractors and subcontractors.

(c) A supplier shall file with the department and his lessee, on or before the end of the month following the quarters ending March 31, June 30, September 30 and December 31 of each year, a certificate, concerning the previous quarter, provided by the department to the lessee, that he has complied with the requirements of this section. (Eff. 6/21/73, Reg. 46)

Authority: AS 38.40.050
AS 38.40.060

8 AAC 35.090. DEFINITIONS. In this chapter, unless the context requires otherwise

(1) "Act" means AS 38.40, Local Hire Under State Leases;

(2) "commissioner" means the commissioner of the Alaska Department of Labor or his designee;

(3) "department" means the Alaska Department of Labor;

(4) "director" means the director of the wage and hour division of the Alaska Department of Labor or his designee;

(5) "emergency" means a condition which represents a threat to the safety of persons, property or the environment;

(6) "employee" means all persons employed by an employer engaged in a project covered by this chapter;

(7) "employer" means a person who has individuals in his employment engaged in a project covered by this chapter and includes persons providing services for a project covered by AS 38.40;

(8) "hearing officer" means a person designated by the director to conduct hearings;

(9) "lease" means all oil and gas leases, easements, leases or right-of-way permits for oil and gas pipeline purposes, unitization agreements or any renegotiation of any of the preceding to which the state is a party after July 7, 1972;

(10) "lessee" means a person who is a party to any oil and gas leases, easements, leases or right-of-way permits for oil and gas pipeline purposes, unitization agreements or any renegotiation of any of the preceding to which the state is a party after July 7, 1972;

(11) "project" means any activity conducted for the lessee or his contractor, subcontractor or supplier which is the result of oil and gas leases, easements, leases or right-of-way permits for oil and gas pipeline purposes, untilization agreements or any renegotiation of any of the preceding to which the state is a party after July 7, 1972;

(12) "qualified" means those persons who, by their education, training and experience or combinations of them, can perform the duties and satisfy the terms and conditions which are usual in the offered employment, provided that the duties, terms and conditions meet the reasonable standards of the industry as required of other employees performing the same type of work in the industry; and

(13) "resident" means a person determined by the department as satisfying the requirements of AS 38.40.090.

(Eff. 6/21/73, Reg. 46; am 7/8/76, Reg. 58)

Authority: AS 23.05.060(5)
AS 38.40.060